JAN 3 1944
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

No. 530

NELLIE FAYE BEAMER, ADMINISTRATRIX OF THE ESTATE OF ROBERT P. BEAMER, DECEASED, *Petitioner*

Versus

THE VIRGINIAN RAILWAY COMPANY, A CORPORATION, *Respondent*

REPLY BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI, AND TO BRIEF FOR PETITIONER IN SUPPORT THEREOF.

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December 30, 1943

HAMMOND'S PRINTING & LITHO. WORKS, ROANOKE, VA.

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To the Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States: —

May it please the Court:

We submit that the petition for a writ of certiorari herein should be denied, for the following good and sufficient reasons:

FIRST: This is a petition for a writ of certiorari seeking a review of a state court judgment, and neither that petition nor the brief in support of it, specifies the stage in the proceedings in the court of first instance and in the appellate court, at which, or the manner in which, the federal questions sought to be reviewed were raised;

the method of raising them; or the way in which they were passed upon by the court; or pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. (Rule 12, paragraph 1, and Rule 38 of this Court.)

We believe that the omissions above referred to are easily accounted for by the fact that no federal question was raised by the petitioner in either the court of first instance or in the state supreme court which was decided adversely to her. As will appear from the record, no sort of federal question was raised by the petitioner and decided against her in the court of first instance. The case was tried in that court on the theory that the 1939 Amendment of the Federal Employees Liability Act did not apply to this case. This is evidenced by Instruction No. 3, found at page 172 of this record, which was given by that court without any objection or exception by the petitioner. So there was no federal question raised and decided adversely to her in that court.

After this case was completed in that court and pending its appeal to the Supreme Court of Appeals of Virginia, the case of Tiller vs. Atlantic Coast Line Ry. Co. 87 L. Ed. Adv. Opin. No. 18, page 1221 was decided by this court.

The claim that assumption of risk was not available as a defense in this case under the 1939 Amendment to the Federal Employees Liability Act was made for the first time by the petitioner in her "Memorandum of

Authorities" in support of her petition for writ of error to the state supreme court (R. p. 13, at p. 16)

The state supreme court might well have ignored that claim, then and in that way raised for the first time, on the ground that such question had not been raised and passed upon by the court of first instance and that it had not been specifically set out in the petitioner's Assignment of Errors to that court (R. page 8). Instead of doing that, however, that court, in view of the opinion of this court in the case of Tiller vs. Atlantic Coast Line Railway Co., supra, fully considered the question raised by the claim made by the petitioner in her "Memorandum of Authorities" and, in accordance with the opinion in the Tiller Case, held that the said 1939 Amendment had abolished the defense of assumption of risk in this case. The petitioner's claim in this respect was not decided adversely to her by the state supreme court. (Opinion of the state supreme court. R. page 177, at page 180 et seq.)

That Court, however, held that although assumption of risk was not available as a defense in this case under the 1939 Amendment, still the petitioner must prove, by a preponderance of the evidence, that this respondent had been guilty of some negligence which resulted in injury to the deceased. It quoted from the Tiller Case (R. page 181) and said:

> "There is nothing new in the test in the Tiller Case to determine when a case should go to the jury or when it should be withheld. For many decades this court has been announcing that disputed questions of fact are for the jury."

That court then proceeds with a fully considered review of the evidence and reaches the conclusion that

this respondent's defense of non-negligence has been sustained in that the evidence did not show any negligence on its part. This was the only question which was decided adversely to petitioner by that court. No question as to the state supreme court's right to pass on that question was raised, or could have been raised, by the petitioner. Nor do we understand that such a question is a federal question, or puts in issue any federal right. The right of courts to pass upon the sufficiency of the evidence, and to direct verdicts was upheld by this court in the recent case of Galloway vs. United States, 87 L. Ed. Adv. Opin. No. 16, page 1042.

SECOND: The only federal question of substance decided by the state court, viz.: that the 1939 Amendment to the Federal Employees Liability Act was applicable to this case, was decided in accordance with the opinion of this court in the Tiller Case. We submit that no one other than the parties to this case has any interest in its final outcome. That the public is not interested in the only question involved in it, and that no principle, or proposition of law, the decision of which will have any bearing upon any other case, is involved, (Rule 38, paragraph 5 of this court's rules.)

THIRD: The evidence of record in this case supports the action of the state supreme court in holding that there was no proof of negligence on the part of this respondent.

This proposition, of course, necessarily involves a consideration by this court of all of the evidence in this record.

We submit that such a consideration of the evidence will show the following as to the facts of this case: —

(a) In order to provide for the electrification of its line from Roanoke, Virginia, to Mullens, West Virginia, the defendent employed the firm of Gibbs and Hill of New York City to design, construct and supervise the construction of its electrical system, including the power plant at Narrows, Virginia. The standing of Gibbs and Hill in the profession as electrical engineers was very high, they having designed and constructed the most important high-tension electrification systems in the eastern part of the United States, including the electrification of the Pennsylvania Railroad from New York to Washington, the New York, New Haven and Hartford Railroad and the electrification of a portion of the Norfolk & Western Railway system and other important electrical projects for high-tension electrified systems of railroads. (R. pp. 117, 118, 145, 160.)

The plant at Narrows, Virginia, was completed and turned over to the defendant November 15, 1925. This plant is in a large building about 80 feet by 150 feet and consists of two stories, a basement room some 30 to 35 feet high, and a turbine floor room which is about 45 feet high. The basement room is below ground level and only a few feet of it is located above ground level. Just how much is above ground level is not shown. In it are located a number of pumps and other machinery. Its outside walls are of solid concrete and there is a brick partition between the basement room and the turbine floor room and the boiler room for the entire length of the building, cutting these rooms entirely off from the boiler room in which are located the furnaces and steam

boilers for the operation of the plant. In the turbine room there are located four large turbines which are used in the generation of electric power. The basement room contains the most of the piping necessary to conduct the steam from the boiler room to the steam turbine generators, all of which piping is covered with asbestos in order to prevent the escape of heat in the pipes leading to the turbines. This steam piping is against or near the ceiling of the basement room. The turbines stand on the floor of this turbine room and there are openings in the floor under each turbine through which the pipes supplying steam to the turbines extend up into the turbines. Between the four turbines there are two large openings extending from the basement floor to the top of the building. These openings are between turbines 1 and 2 and between turbines 3 and 4, and are each about 30 feet long by 18 or 20 feet wide.

Robert P. Beamer, the deceased, was employed by Gibbs and Hill as a pipe or steam fitter in the construction of the plant and in the installation of all piping in the building, including that which serves the turbines. Because of his familiarity with the piping and the work to be done in connection therewith the defendant, when it took over the plant from Gibbs and Hill, in November, 1925, employed Beamer as a pipe fitter. He was more familiar with the pipe layout than anyone about the plant, (R. page 149 and 118). He continued in defendant's employ as a pipe fitter from November, 1925, to the date of his death on July 26, 1940.

On account of the nature of the plant and the purpose for which it is operated, there are places in which the men employed have to work from time to time which are above normal temperature and at times are very hot. (R. p. 119). In order to make such places as comfortable as

possible for men who have to work therein, the defendant supplies a compressed air hose with attachments at convenient locations, so that the men, by the use of such hose, can bring about a circulation of air and thus reduce the temperature of such places. This was well known to the deceased, as well as to all other employees at the plant, and on various occasions Beamer had used the hose for this purpose. (R. pp. 119, 149). There also prevailed a custom at the plant which permits the men who have to do work in these hot places, to come out of such places to cool off, and under this custom the man who is doing the work is permitted to be the judge as to when he will come out for the purpose of cooling off. The matter of how often he will come out and how long he will stay out is left entirely to the discretion of the employees at the plant. (R. pp. 119, 121, 56, 59)

Beamer had entire charge of repairs and replacements to the steam pipes and he had one helper, Wimmer, who was employed as his helper for a period of about thirteen years. (R. pp, 55, 56, 118). The Superintendent of the plant would sometimes tell Beamer where a leak had developed or that a change should be made, and he would go ahead and make the necessary repairs or changes. When the repairs or changes were not familiar or were out of the ordinary routine, Beamer and the superintendent would talk the matter over and Beamer would then do the work. (R. pp. 118, 119). On the morning of Beamer's death the vacuum under turbine No. 1 was slightly low, that is, its efficiency was reduced, and the machine was shut down about seven-thirty, a. m., and not again put in operation that day. (R. p. 121). Bowser, the superintendent, told Beamer to correct this defect and he and his helper started to work on the turbine about noon of that day. They found that there was a break in a large expansion joint in the steam line,

which joint was located below the turbine floor and just below the ceiling of the basement room. Beamer got a new joint for the turbine from the store room and he and his helper proceeded to replace the broken joint with the new joint. (R. P. 120). In order to get at the place where the work was to be done, they removed a plate 28 inches by 50 inches from the side of the turbine and above the turbine floor and the helper, Wimmer, went down to the place of work through that opening. Beamer went down on an elevator from the turbine room to the basement floor and then climbed a stairway from the basement floor about 30 feet up to a landing near the place where the work was to be done. While doing the work they stood on a temporary platform across steam pipes. (R. pp. 44, 45). It took them about 2½ hours to complete the job. While doing the work they did not use the compressed air hose, although it was convenient for use had they desired to use it. (R. pp. 48, 49, 55, 56). They did come out from the place at least twice for the purpose of cooling off. (R. p. 45). After they finished the work, Wimmer came out through the opening in the side of the turbine and Beamer handed him the tools with which they had been working. Then Beamer went down the stairway to the basement floor and came up the elevator to the turbine room. Then he walked through that room some 140 to 150 feet and sat down on an outside platform at the far end of that room for a short time. He then walked into the machine shop on the same floor, a distance of about 80 feet, and died suddenly while he was standing in that shop. The work that Beamer and his helper did on that day was nothing new or out of the ordinary, (R. page 52). During the 15 years that he worked as pipe fitter at the plant, the job of changing joints under some of the four turbines, all of which were of the same construction, would occur about once every

three to six months. Very few days went by that Beamer did not have to get under the turbines to do some work, (R. page 121). A short time before the day Beamer died, he and his helper had brazed or repaired a crack in the same expansion joint which they replaced that day, (R. pp. 54, 59-60). An hour to a hour and a half after the death of Beamer the temperature of the place they were working was taken and found to be 132° F. Prior to the taking of the temperature no one about the plant knew what it was. As to the foregoing facts, there can be no controversy or dispute.

(b) The claim is made by the ~~respondent~~ petitioner that the deceased, Beamer, was required by the plant superintendent to finish the installation of the new expansion joint in the pipe by four o'clock in the afternoon of the day he was making the installation. In making this claim petitioner relies solely upon the statement of the witness, Wimmer. That witness stated that Beamer said he "wanted" to finish that work on that shift (i. e. by 4:00 p. m.) (R. p. 45); and, on R. p. 56, that Beamer said he had to finish by that hour. No witness testified that the superintendent instructed him to complete the work by 4:00 p. m. On the contrary, the superintendent testified that he gave Beamer no orders to that effect, that there was no necessity for finishing that work that day; and that the only reference to 4:00 was made by Beamer when he said that if the joint was repaired instead of being replaced the job could not be finished by 4:00 p. m. (R. pp. 121, 122)

(c) The accumulation of dust under the turbine being repaired and the time required to remove this dust so that the air hose could be used in doing the work in which Beamer and Wimmer were engaged are sought to be established for the purpose of excusing Beamer from

using the air hose for the purpose of cooling off the place in which the work was being done. The whole of the testimony of Wimmer, on whose statements these facts are sought to be established, shows that there is no merit in these contentions. The testimony of the superintendent, Bowser, if read as a whole, shows also that these contentions are without merit, and that it was left entirely to the discretion of Beamer to take the necessary precautions to make the place safe for the work to be done therein. On page 126 of the Record, Bowser, referring to the matter of cleaning the dust from the piping by blowing with the air hose, stated: — "Q. Who does that blowing? A. Usually the pipe fitters would do that."

The only pipe fitters at the plant were Beamer and his helper, Wimmer. These pipes were located next to the ceiling of the basement room which was approximately 35 feet in height, and the only employees at the plant who had any work to do on those pipes or any occasion to be about them were Beamer and Wimmer. If it was necessary to remove the dust from them it was the duty and responsibility of Beamer alone to do that. This even though it might have required an hour or more to remove the dust. He had plenty of time to do it. There was no reason that the repairs to the piping had to be finished by 4:00 p. m. that day (R. pp. 120, 121). There were four turbines in the plant and three would take care of the load (R. pp. 121, 122). The mere fact that there may have been dust on the pipes affords no excuse for Beamer's failure to use the air hose to improve the condition of the air in the place where he worked. It was also his duty to take other precautions for his own safety, in that it was left entirely to his discretion as to how often he would come out of the place in which he was working for the purpose of cooling off and how long he would stay out for that purpose. Under these circumstances he

cannot recover on the alleged ground that the place of work was in an unsafe condition for the work to be done. L. & N. Ry. Co. vs Williams (Ky.) L. R. A. 1915 E. 613, 165 Ky. 386; 39 C. J. Section 965 (f) p. 766, ibid note 46, 46 (a); L. & N. Ry. Co. vs McCoy (Ky.) 110 S. W. (2d) 433; Davis vs C. & O. Ry. Co. (Ky.) 179 S. W. 422; Grosscup vs C. & N. W. Ry. Co., 14 Fed. Supp. 276; Grammer vs Mid Continent Petroleum Co. (C. C. A. 10th.) 71 Fed. (2d) 38; C. & O. Ry. Co. vs Butler, 177 S. E. 195, 163 Va. 626.

(d) Also the principle that an employee is necessarily the best judge of his own strength and power of endurance, and if injury to him results from his failure to correctly judge his own strength and power of endurance the employer cannot be held liable on the theory that there was negligence on its part, seems well established. L. etc. Ry. Co. vs Sawyer, 169 Ky. 671, 675, 184 S. W. 1123; Lloyd vs N. & W. Ry. Co., 151 Va. 409, 145 S. E. 372, 376; Lang vs N. S. Reduction Co. (C. C. A. 7th.) 110 Fed. (2d) 441; Swieg vs C. M. & St. P. Ry. Co. 216 Fed. 750, 753. Under these authorities it seems clear that if Beamer was adversely affected by the heat it was because he overtaxed his powers of endurance, and the respondent cannot be held liable on the theory that negligence on its part has been established which, under the law, entitles the petitioner to recover.

This principle of law is especially applicable to this case in view of the fact that, during the entire 15 years that the plant had been in operation under the same condition it was in the day of Beamer's death, and during which time work similar to that which Beamer was doing on the day of his death was prformed by him every three to six months, no employee at the plant had ever

been injuriously affected by the heat. (R. pp. 58, 122, 148).

The respondent was not required under the law to foresee and guard against casualties which were not reasonably to be expected to occur, and which could not have been reasonably anticipated in the exercises of ordinary care. Wyatt vs C. & P. Tel. Co. 158 Va. 472, 82 A. L. R. 396; Southern Ry. Co. vs Bell, (C. C. A. 4th.) 114 Fed. (2d) 341, 343; B. & O. Ry. Co. vs Carroll, 280 U. S. 491, 74 L. Ed. 566.

(e) The respondent's plant was properly designed, equipped and operated. The undisputed evidence given by men who had wide and varied experience in the construction and operation of and acquaintance with, such plants, shows that to be a fact, and especially with relation to that part of this plant at which Beamer worked on the day of his death. (R. pp. 129, 136, 147, 160, 161). The petitioner bases her claim of defective construction of the plant in that there were no windows in the basement room and no mechanical ventilation system was installed in the plant. The evidence shows that it would have been impracticable and unsafe to have put windows in the walls of that room. Practically that entire room is below ground level. The plant stands on the bank of New River and any windows which might have been put in the walls of the basement room would have subjected the basement to the grave danger of flooding the entire basement in the times of flood waters in the River. Such windows would be below flood level (R. pp. 131, 148, 154). If such windows had been put in the basement walls, or if a mechanical ventilation had been installed, and if the effect thereof had been to reduce the temperature around the turbines where Beamer worked, that would have reduced the efficiency of the operation of the

turbines. (R. pp. 133, 147, 152, 154). This evidence is not disputed.

Of the large number of such plants with which the witness Reich was familiar, no one of them had windows in its basement (R. p. 164); nor was there any arrangement for mechanical ventilation or otherwise in that part of the equipment under the turbines where Beamer worked. (R. 161).

The customary practices and usages as to plant equipment, machinery and methods of operation are determinative of the question of negligence as applied to any particular line of business, especially where there is no evidence to the effect that different practices and usages prevail in any similar line of business that are shown by the evidence to be safer or more suitable. The undisputed evidence is that no different practices and usages have been adopted in the construction and operation of power plants similar to that of respondent, Southern Ry. Co. vs Lewis, 113 Va. 117; Southern Ry. Co. vs. Chadwick, 144 Va. 443, 452; C. & O. Ry. Co. vs Butler, 163 Va. 626, 177 S. E. 195. Furthermore the standards in respect to the engineering, architectural, mechanical and other scientific questions as to plant methods of operation are not to be left to the uncertain and varying judgments of juries. Toledo etc. Co. vs Allen, 276 U. S. 165, 72 L. Ed. 513, 516; Southern Ry. Co. vs Verelle (C. C. A. 4th.) 57 Fed. (2d) 1008; Sumney vs Southern Ry. Co. (C. C. A. 4th.) 89 Fed. (2d) 437; B. & O. Ry. Co. vs Groeger, 266 U. S. 521, 69 L. Ed. 419; Crosswhite vs Southern Ry. Co., 181 Va. 40, 46.

If juries were allowed to establish standards with respect to such questions, for instance as to whether a plant of the nature of the large and complicated power

plant of the respondent was properly constructed and operated, an intolerable situation would be presented. In such cases the standards in such matters would vary according to the peculiar temperaments and views of juries trying each case, and there would be no fixed rule applicable to all cases that might be submitted to the determination of juries.

SUMMARY

In this case we have a man (Mr. Beamer) who had taken part as a pipe fitter in the installation of the piping system in this large power plant when it was constructed. When the plant was completed and turned over to the respondent in 1925, the respondent employed him to work for it in the same capacity as pipe fitter, especially because of his familiarity with the piping system in this plant, and with the work to be done in connection therewith. He was placed in charge of the pipes and the work to be done in connection therewith, and he and his helper did all of the work that was done in connection with those pipes. This continued for a period of fifteen years, and during that period, every three to six months he and his helper performed the same sort of work under the same conditions that they did on the afternoon of the day of his death. He was allowed to be his own judge as to when and how often he would go out of his place of work for the purpose of cooling off, and as to how long he would stay out for that purpose, and as to whether he would use the air hose for improving conditions in his working places. This without any interference by the superintendent. During all of that period neither he, nor his helper who worked right along with him, nor any other person had been injuriously affected by the heat.

We respectfully submit that, under the circumstances of this case, the petition for a writ of certiorari should be denied.

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